Supreme Court, U.S.
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No. 95-145

In The

Supreme Court of the United States

October Term, 1995

ELIOT R. FREEMAN,

Petitioner,

vs.

TOWN OF WEST BOYLSTON, CHARLES GREENOUGH and KATHLEEN FOREMAN,

Respondents.

On Petition for Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Supreme Judicial Court of the Commonwealth of Massachusetts correctly reversed judgments for the Petitioner on his substantive due process claim where Petitioner based his claim, both at trial and on appeal, upon the substantive due process standard articulated by the Court of Appeals for the First Circuit.

2. Whether a conflict exists between the standard applied by the Massachusetts Supreme Judicial Court to the Petitioner's substantive due process claim and the standard applied by the Court of Appeals for the First Circuit and other federal courts to comparable claims such as to require clarification of the standard by this Court.

3. Whether the case below presents an appropriate record to address and resolve real or perceived variations in the circuit courts' articulation of the standard for substantive due process claims where, to avoid a manifestly unjust result to the Respondents, reversal of the standard applied would necessitate examination of procedural issues by which the Supreme Judicial Court declined to address the existence of a constitutionally protected property interest prerequisite to a successful substantive due process claim.

4. Whether the case below presents an appropriate record to address and resolve real or perceived variations in the circuit courts' articulation of the standard for substantive due process claims where qualified immunity and the absence of an impermissible pattern, practice or policy provide independent grounds to sustain the judgment below.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those constitutional and statutory provisions referenced by Petitioner in his Petition for a Writ of Certiorari, the Respondents rely upon the following authorities:

> Massachusetts Subdivision Control Law [hereinafter "SCL"], Mass. Gen. L. ch. 41, §§ 81M, 81O, 81Q, 81R, 81T, 81U, 81W, and 81BB (1994) (reproduced in pertinent part in the Respondents' Appendix A, attached hereto).
>
> Fed. R. Civ. P. 51
> Mass. R. Civ. P. 51(b) (Quoted herein).
>
> Rules and Regulations Governing the Subdivision of Land, West Boylston, Massachusetts, Sections IV.A.1.a and IV.A.2.e and Table 1 (Quoted, in pertinent part, herein).

STATEMENT OF THE CASE

A. Facts and Law

In his zeal to reach a basis for review of sufficient magnitude, Petitioner has mischaracterized the record and pivotal state law in several critical instances. These mischaracterizations primarily center around the degree of discretion conferred by Massachusetts law upon planning boards in general and the Respondents in particular in the context of the state proceedings below, and in Petitioner's characterization of the series of interim orders of the judge to whom he appealed the planning board's disapproval of his initial subdivision plan.

As a preliminary matter, to evaluate the interim orders, it is important to recognize that Petitioner submitted two plans. The initial plan, submitted to the Board on August 26, 1985 (R. 40, ¶12), was disapproved on October 24, 1985 (R. 165-72). A revised plan, incorporating newly submitted drainage revisions, was not submitted until two years later, on October 21, 1987 (R. 341-51), after the state superior court judge ordered Petitioner to submit all drainage plans and calculations to the Board no later than October 30, 1987. (Petitioner's App. A-43).[1] The Board promptly voted, on November 16, 1987, to approve the revised plan, subject to conditions (including the condition that a public hearing be held). (R. 238-43). Petitioner refused to submit to a public hearing until the superior court judge, on March 18, 1988, ordered him to do so, declaring that "[t]he fact that the plaintiff has submitted a revised plan does not vitiate the statutory requirement of a hearing." (Petitioner's App. A-39). Issuance, in June, 1988, of a Certificate of Planning Board Action approving the revised plan (R. 252-54) followed swiftly on the heels of a May, 1988 public hearing. (R. 250-51). Petitioner challenged one of the conditions of approval, requiring intersection safety documentation (Trial Transcript 201-03) [hereinafter "T.T."], which was then stricken by the judge on August 24, 1988. (R. 261).[2]

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1. During the intervening period, the Board's consulting engineer had continued to review revised drainage calculations submitted by Petitioner in March, May and August of 1987, finding them inadequate to meet "the court mandated standards" for 25 year storm events as set forth by the judge in a decision dated October 9, 1986. (Petitioner's App. A-52 - A-53; R. 201-08, 214-26, 229)

2. An abutter's appeal was settled in March of 1989 (T.T. 208; R. 267-76), removing the statutory obstacle to plan endorsement of nearly nine months from the Board's June 1988 Certificate of Planning Board Action. (Petitioner's App. A-11). Thereafter, the Board promptly endorsed the revised plan on April 18, 1989 (R. 278).

When Petitioner, at 6, refers to delays in his ability to "proceed with his development" from the time of his original "proposal," he glosses over the fact that he actually submitted two different plans two years apart. He thus avoids disclosing the length of his own delay in submitting a revised plan and, in turn, his refusal to submit the revised plan to a statutorily required public hearing at which "objectors (as well as the developer) have the right to be heard" (Petitioner's App. A-39) and from which aggrieved abutters might, and indeed did, appeal a vote of plan approval. Mass. Gen. L. ch. 41, § 81BB. (R. 267-76; T.T. 208). In fact, as this chronology indicates, during the nineteen month period between the October, 1986 remand order and a public hearing on the plan held on May 9, 1988 (R. 250-51),[3] at least sixteen of the nineteen months' delay were caused solely by Petitioner's own delay in submitting conforming drainage plans (twelve months) and his refusal to submit to a statutorily mandated public hearing (four months).

As to the applicable state law, Petitioner, at 4, mischaracterizes Mass. Gen. L. ch. 41, § 81K, *et seq.* — the comprehensive body of laws and procedures known as the Subdivision Control Law (SCL) — as bestowing "no discretionary authority" upon local planning boards, in direct contradiction of the decision of the Supreme Judicial Court below (Petitioner's App. A-20) and the orders of the superior court judge upon which Petitioner relies. (*See* Petitioner's App. A-39 - A-40, A-53, ¶14).

In fact, a planning board has considerable discretion pursuant to the SCL in that it may set discretionary local standards for the safe design and construction of roadways. Such standards take the form of "reasonable rules and regulations,"

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3. Petitioner's civil rights complaint sought damages for a one and a half year delay "after [the judge's] remand order." (R. 45, ¶31).

commonly referred to as "subdivision regulations," which, as described in Section 81Q of the SCL, are highly discretionary in nature, circumscribed only by the purposes set out in Section 81M. Pursuant to Section 81R, ¶52, it may also, when engaged in definitive plan review, decide whether to strictly enforce or waive in whole or in part such regulations, *Mac-Rich Realty Constr., Inc. v. Planning Bd. of Southborough*, 4 Mass. App. Ct. 79, 85 (1976); *Canter v. Planning Bd. of Westborough*, 7 Mass. App. Ct. 805, 812 (1979), and may choose whether to simply disapprove a legally deficient plan or to in effect cure such defect for the applicant by approving it as modified by conditions. Mass. Gen. L. ch. 41, § 81U, ¶2.

Once a plan, such as Petitioner's initial plan, has been acted upon, a court on appeal may not substitute its discretion for that of the board. *Strand v. Planning Bd. of Sudbury*, 5 Mass. App. Ct. 18, 22-24 (1977). Only where it can find *no* supportable basis for disapproval may a reviewing court remand the matter for a public hearing to permit the board to further articulate its basis for disapproval. *See, e.g., Fairbairn v. Planning Bd. of Barnstable*, 5 Mass. App. Ct. 171, 179 (1977).

Such further articulation was not necessary here, where, contrary to Petitioner's representation, at 4, the superior court judge *upheld* the disapproval on two valid grounds — drainage and the absence of board of health review pursuant to Mass. Gen. L. ch. 41, §§ 81M and 81U. (Petitioner's App. A-6).[4]

Petitioner's assertion, at 5, that "the court annulled the Planning Board's decision on the grounds that it exceeded the board's authority," ignores the statement in the same order that

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4. Hence, Petitioner's assertion, at 4, that "[i]t is undisputed that the first two grounds [of disapproval cited by Petitioner] exceeded the regulations of the Planning Board" is not true.

the Board's decision was "AFFIRMED" (Petitioner's App. A-44) and is, therefore, more than just a benign half-truth. Rather, Petitioner misstates both fact and law, since, under Massachusetts law, planning board disapproval is valid where any single valid basis for disapproval has been identified and the reviewing authority has no authority to annul it. *Fairbairn v. Planning Bd. of Barnstable*, 5 Mass. App. Ct. 171, 179 (1977); *Loring Hills Developers Trust v. Planning Bd. of Salem*, 374 Mass. 343, 352 (1978).[5]

Remand of the matter to the planning board, after upholding disapproval on two grounds, was, therefore, confusing indeed. Petitioner's construction of the language of the judge's interim order, seeking "action consistent with this decision" (Petitioner's App. A-44 - A-45), as compelling approval of his plan simply cannot be reconciled with the court's statutory authority. *Fairbairn*, 5 Mass. App. Ct. at 179; *Loring Hills*, 374 Mass. at 352. In addition, contrary to the Petitioner's representation, at 5, and as the Supreme Judicial Court observed,

> [n]owhere in that decision was it stated that the board's sole remaining responsibility was to accept and consider additional material from the plaintiff concerning drainage. Also, nowhere in that decision was it suggested that the board had forfeited the right to insist on compliance with the through street requirement. The board's failure to do at this

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5. Petitioner also misstates the literal terms of the sight distance regulation, Section IV.A.2.e, when, at 4, he states that the Board "increased" the sight distance from 275 feet. The regulation provides that 275 feet is the "*minimum* stopping sight distance" that shall be required. IV.A.2.e and Table 1 (emphasis added) (R. 141, 149). *See also* Petitioner's App. A-4 n.4; *Canter*, 7 Mass. App. at 811 ("normally" in regulation allows discretionary case by case determination).

> point what the plaintiff contends it was required to do was neither irrational nor obviously at odds with the judge's order. In fact, as subsequent events established, the October, 1986, order did not instruct the board that its sole remaining responsibility vis-a-vis the plaintiff's plan was to consider data related to drainage, since the judge subsequently agreed with the board that it was also required to hold an additional public hearing on amendments to the plaintiff's plan.
>
> * * *
>
> [A]s late as March, 1988, the judge agreed with the board's position to the extent of ordering a new public hearing, and declined to instruct the board that it must confine itself to considering the drainage issue.

(Petitioner's App. A-15; *see also* Petitioner's App. A-39 - A-40).

In upholding the planning board's requirement of the statutory hearing, the judge, as previously noted, declined to rule on the Board's other articulated conditions of approval, concluding that it was premature to reach the other issues. (Petitioner's App. A-39 - A-40; R. 244-46). Hence, the judge let stand conditions of approval of the revised plan previously voted at the Board's November 16, 1987 meeting, including (in addition to the public hearing requirement) the condition that Petitioner submit documentation of the safety of the intersection design (R. 240, ¶B.d) and a reiteration of a previous denial of

Petitioner's request for a waiver of the through street regulation (R. 241, ¶D.b).[6]

At the May, 1988 public hearing, several abutters spoke against requiring a through street. (R. 250-51). Accordingly, at its meeting on June 20, 1988, the Board voted to grant the plaintiff's request to waive the through street (R. 388), and, on June 24, 1988, issued a Certificate of Planning Board Action approving plaintiff's subdivision plan as revised by drainage design

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6. The Board also voted to include a condition in its Certificate of Planning Board Action that its "revised findings of fact and conditions of approval are deemed by the Court to be consistent with the Remand Order." (R. 238, ¶1). As such, contrary to Petitioner's assertion, at 5, the Board was attempting to comply with the order of the judge and not acting "in violation of that order." Since, as the Supreme Judicial Court determined, the judge did *not* require the Board to limit its decision to drainage only (Petitioner's App. A-15), it is impossible to say the Board "knew" the opposite, as Petitioner, at 5-6 and 6 n.4, contends. In fact, nowhere in the testimony cited by Petitioner, at 6 n.4, did Respondents "admit[] . . . the Board deliberately and intentionally violated" the judge's orders or "flagrantly disregarded . . . the advice of its own counsel" as asserted, at 6 n.4, by Petitioner. Both Foreman and Greenough testified that they were confused by the remand order (T.T. 436, 430, 734) and believed there were additional discretionary issues before the Board left unaddressed by the judge's order (such as whether to waive the Board's through street requirement) (T.T. 481) and their counsel had confirmed that view by indicating that the topic of intersection design remained open for discussion. (Petitioner's App. A-16; R. 299-300, 379). Furthermore, the Board's consulting engineer advised the Board that, although the judge had ruled that the Board did not have authority to impose additional sight distances beyond the "*minimum* stopping sight distance" (emphasis added) of 275 feet contained in Section IV.A.2.e of the Board's regulations (R. 141, 149), "the Court did not relieve the applicant's engineer from his professional obligation to use reasonable design standards . . . and to convince [the] Board that he had done so" in the form of intersection safety documentation. (R. 377, 379). As such, contrary to Petitioner's assertion, at 6, the requirement of intersection safety documentation was *not* "the very same issue" which the trial judge had ruled on at trial, nor does the record suggest the Board believed it to be the same.

modifications, subject, among other conditions, to submittal of "recognized and accepted technical documentation substantiating the safety and adequacy of the intersection design . . . " (R. 254, ¶B.d.). The Board cited as factors the steep grade of the existing street (7% to 10%) where hazardous icing conditions were known to develop as well as "blind spots" in the sight distance lines on both the proposed and existing roads (R. 252-54, ¶B.a-b), relying upon Section 81M of the SCL as expressed in the requirement of its regulations, Section IV.A.1.a, that all streets in a subdivision "be designed so that, in the opinion of the Board, they will provide safe vehicular travel." (R. 140).

Only after issuance of the June 1988 grant of subdivision plan approval did the court, on August 24, 1988, on a motion by Petitioner solely challenging the condition as to intersection safety documentation (T.T. 201-03), strike as in excess of the Board's authority the requirement that Petitioner provide such documentation. (R. 258, 261).

B. Procedural History

On December 20, 1988, Petitioner filed this civil rights action pursuant to 42 U.S.C. § 1983 seeking damages for a one and a half year delay (R. 45, ¶ 31) in approval of his revised plan from the date of the October 17, 1986 remand of his initial plan and claiming such delay to be a violation of his substantive due process rights.[7]

Respondents' motions for summary judgment and directed verdicts were denied and the jury returned verdicts against the Town and Planning Board members, Foreman and Greenough, individually, in the amounts of $375,000.00, $50.00 and $50.00,

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7. A claim under the Massachusetts Civil Rights Act, Mass. Gen. L. ch. 12, § 11I, is not a subject of the Petition.

respectively. (R. 76-81). Attorney's fees, interest and costs in the amounts of $120,000.00, $190,875.00, and $3,333.75, respectively, were granted by the Court. (R. 116-18). Respondents' motions for judgment notwithstanding the verdicts were denied (R. 110-15) and the Respondents timely appealed to the Massachusetts Appeals Court. (R. 125). The Massachusetts Supreme Judicial Court transferred the case *sua sponte* and reversed the judgments of the Superior Court on all counts. 419 Mass. 548 (1995) (Petitioner's App. A-1 - A-21).

REASONS FOR DENYING THE WRIT

I.

THE SUPREME JUDICIAL COURT CORRECTLY REVERSED JUDGMENTS FOR THE PETITIONER WHERE PETITIONER BASED HIS CLAIMS, BOTH AT TRIAL AND ON APPEAL, UPON THE SUBSTANTIVE DUE PROCESS STANDARD ARTICULATED BY THE COURT OF APPEALS FOR THE FIRST CIRCUIT.

A. Petitioner Is Precluded from Arguing the Application of a Standard Different from the Standard He Relied Upon at Trial and Before the Supreme Judicial Court.

The Supreme Judicial Court noted that neither party objected to jury instructions framed on the basis of *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28 (1st Cir. 1991), *cert. dismissed as improvidently granted*, 503 U.S. 257 (1992),[8] which, therefore became the law of the case. (Petitioner's App. A-12 - A-13, *citing Barry v. Stop & Shop Cos.*, 24 Mass. App. Ct. 224, 230 (1987)).

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8. Indeed, Petitioner's counsel stated to the trial court "Your Honor, . . . if you set the standard [as] in the *PFZ* case, . . . I'll agree to that." (App., *infra*, 7a).

Under the federal and state rules of civil procedure, a party has an affirmative obligation to object to a jury instruction it considers erroneous prior to the jury retiring to consider its verdict. Fed. R. Civ. P. 51; Mass. R. Civ. P. 51(b).[9] Both federal and state courts have applied Rule 51 to preclude a party from raising on appeal an issue that was encompassed in the jury charge and to which the appellant failed to object in a timely manner. *E.g., Springfield v. Kibbe*, 480 U.S. 257, 259 (1987); *Solimene v. B. Grauel & Co., KG*, 399 Mass. 790, 804 (1987); *Benjamin v. Felton & Son, Inc.*, 9 Mass. App. Ct. 926, 927-28 (1980); *see also Flood v. Southland Corp.*, 416 Mass. 62, 66-67 (1993). Petitioner is, therefore, unable to raise this issue at this late stage, where he *agreed* to a jury instruction derived solely from First Circuit precedent (App., *infra*, 7a) and failed to raise the argument on appeal to the Supreme Judicial Court. Brief of Plaintiff-Appellee, *Freeman v. Town of West Boylston, et al.*, 419 Mass. 548 (1995) (No. SJC-06645).[10]

This case is substantially similar to that presented to this Court in *Springfield v. Kibbe*, 480 U.S. 257 (1986), *cert. dismissed as improvidently granted*. There the Court, in granting certiorari, anticipated that it would be able to reach the question

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9. Massachusetts Rule of Civil Procedure 51(b) is substantially similar to the cognate federal rule, providing that:

> No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objections.

10. Notably, Petitioner fails in this regard to include in his Statement of the Case any indication of the point(s) in the proceedings below where he raised the issue he now attempts to argue before this Court, as required by Rule 14.1(h) of this Court's Rules, thus failing to demonstrate that the question "was timely and properly raised so as to give this Court jurisdiction. . . ."

whether a "heightened negligence" standard was sufficient to establish liability of a municipality under 42 U.S.C. § 1983 for inadequate training of its employees, consistent with the Court's decision in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978). *Kibbe*, 480 U.S. at 258. While the Petitioner argued that such a standard was insufficient under *Monell's* requirement of a municipal policy, this Court concluded, after full briefing and oral argument, that it could *not* reach the merits of the case where petitioner did not object to the jury instruction on heightened negligence and failed to argue for a higher standard than gross negligence in the Court of Appeals.

The Court stated, "[w]e ordinarily will not decide questions not raised or litigated in the lower courts. That rule has special force where the party seeking to argue the issue has failed to object to a jury instruction" due to the restrictions of Rule 51. *Id.* at 259. Massachusetts courts have similarly applied Mass. R. Civ. P. 51(b). *See Bank of Boston v. Haufler*, 20 Mass. App. Ct. 668, 671 n.7 (1985) and the decision below. (Petitioner's App. A-13 n. 13).

For the reasons stated by this Court in *Kibbe*, Petitioner's failure to object to the jury instructions on substantive due process which were based upon First Circuit decisions, indeed his agreement that the trial court apply the same (App., *infra*, 7a), and his failure to argue for a different standard in the Supreme Judicial Court should preclude him from raising the argument before this Court. The writ of certiorari, therefore, should be denied.

B. There Has Been No Departure from Decisions of the First Circuit.

Although the Supreme Judicial Court of Massachusetts applied "the law as it has been articulated by the First Circuit"

(Petitioner's App. A-13 n.13), quoting extensively from First Circuit decisions (*Id.* A-13 - A-17), Petitioner at 3, 8-9, on the basis of such quoted verbiage, asserts the creation of a new standard by the state court because of the court's use of the phrase "truly horrendous," a phrase taken from the First Circuit's decision in *Nestor Colon Medina & Sucesores, Inc. v. Custodio,* 964 F.2d 32, 45 (1st Cir. 1992).

The "conflict" thus posited by Petitioner as a basis for review poses at most a verbal tension in the language of the decision below. Nowhere in the Supreme Judicial Court decision, however, is the quoted language employed to annunciate a "new standard" of review. Moreover, nothing in the record suggests that this case would be decided differently by the First Circuit or any of the other federal courts of appeals. *See* discussion, *infra,* part II.

Petitioner, at 9 n.9, asserts that the First Circuit's use of the term "horrendous" in *Nestor Colon* did not suggest that "horrendous" conduct was interchangeable with "egregious misconduct" or that conduct need be horrendous to comport with that standard. The distinction, regardless of its validity, is meaningless in this case. No First Circuit decision has been cited which suggests that the conduct here in question, as a matter of law, rose even to the level of "egregious misconduct." The Supreme Judicial Court's analysis clearly reveals that it did not suggest or impose a higher threshold than the First Circuit. Rather, the Supreme Judicial Court canvassed the First Circuit's decisions to determine whether, viewing the evidence in the light most favorable to Petitioner, there was sufficient basis to demonstrate the "requisite arbitrariness and caprice" to constitute a violation of the Petitioner's Federal Constitutional rights and applied that standard to Respondents' actions. (Petitioner's App. A-13, *quoting Amsden v. Moran,* 904 F.2d 748, 754 n.5 (1st Cir. 1990), *cert. denied,* 498 U.S. 1041 (1991)).

Indeed, First Circuit decisions consistently agree with the Supreme Judicial Court's findings that where, as here:

1) there has been no deprivation of procedural protection (Petitioner's App. A-11); and

2) "state courts are available to correct error" (Petitioner's App. A-14, *citing PFZ Properties. Inc. v. Rodriguez,* 928 F.2d 28, 32 (1st Cir. 1991), *cert. dismissed as improvidently granted,* 503 U.S. 257 (1994) (*quoting Chiplin Enters., Inc. v. City of Lebanon,* 712 F.2d 1524, 1528 (1st Cir. 1983)),[11];

3) where, viewing the record in the light most favorable to Petitioner, no deliberate flouting of a court order can be found (Petitioner's App. A-15, A-16, contrasting the record with that in *Roy v. Augusta,* 712 F.2d 1517 (1st Cir. 1983)); and

4) the record discloses "no evidence of personal animus, that other developers were treated more favorably than the [Petitioner], or that board members stood to profit personally from their actions" but rather, that the board members "were motivated by doubts about the safety of the intersection, a legitimate area of concern for a local planning board," (Petitioner's App. A-17)[12],

the "requisite arbitrariness and caprice", *Amsden,* 904 F.2d at 754

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11. *See also Parratt v. Taylor,* 451 U.S. 527 (1981); *Paul v. Davis,* 424 U.S. 693 (1976).

12. *Contrast Cordeco Dev. Corp. v. Vasquez,* 539 F.2d 256, 260 (1st Cir.) (recognizing a constitutional violation by local officials singling out a permit applicant for adverse treatment due to "illegitimate 'political' or, at least personal motives"), *cert. denied,* 429 U.S. 978 (1976).

n.5, has not been reached, leaving no issue of fact for the jury. (Petitioner's App. A-15 n.15).

As such, no basis exists for reviewing the decision as a departure from the decisions of the First Circuit.

II.

THERE IS NO CONFLICT BETWEEN THE STANDARD APPLIED BY THE MASSACHUSETTS SUPREME JUDICIAL COURT TO THE PETITIONER'S SUBSTANTIVE DUE PROCESS CLAIM AND THE STANDARD APPLIED BY THE FIRST CIRCUIT COURT OF APPEALS AND OTHER FEDERAL COURTS TO COMPARABLE CLAIMS.

Petitioner, posing a second verbal conflict, asserts, at 3, that the First Circuit "expressly rejects the arbitrary and capricious test" to evaluate substantive due process claims, despite reference in First Circuit cases to the "requisite arbitrariness and caprice," *Amsden v. Moran*, 904 F.2d 748, 754 n.5 (1st Cir. 1990), *cert. denied*, 498 U.S. 104 (1991), and reliance upon such articulated standard by the Supreme Judicial Court in reaching its decision. (Petitioner's App. A-13). *See* discussion, *supra*, Part I.B.

The First Circuit, itself, noting a range of linguistic variation among the decisions, has "declined the invitation to sort out so wide a variety of labels," and has chosen to put "[w]ordplay" aside. *Amsden*, 904 F.2d at 754. Instead, the First Circuit, in harmony with other circuits, has, in the absence of fundamental procedural irregularity, invidious discrimination, or infringement on a fundamental interest, *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 833 (1st Cir. 1982), focused upon whether the challenged action is "sufficiently keyed to any

legitimate state interests." *PFZ Properties. Inc. v. Rodriguez,* 928 F.2d 28, 31-32 (1st Cir. 1991), *cert. dismissed as improvidently granted,* 503 U.S. 257 (1994). In so doing, the First Circuit and other circuit courts echo this Court's approach to substantive due process challenges in the land use arena as stated in *Euclid v. Ambler Co.,* 272 U.S. 365, 395 (1926), and *Nectow v. City of Cambridge,* 277 U.S. 183, 187 (1928) ("a court should not set aside the determination of public officers in such a matter unless it is clear that their action has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense."). *See, e.g.,* decisions cited in Petitioner's survey at 10-12: *RRI Realty Corp. v. Village of Southampton,* 870 F.2d 911, 915 (2d Cir.) (*citing* "the deferential standards of *Euclid*"), *cert. denied,* 493 U.S. 893 (1989); *DeBlasio v. Zoning Bd. of Adjustment for the Township of W. Amwell,* 53 F.3d 592, 600 (3d Cir. 1995) (focusing on "partisan political or personal reasons unrelated to the merits of the application" or "any legitimate governmental objective"); *Blanche Road Corp. v. Bensalem Township,* Nos. 94-1344 & 94-1362, slip op. at 23-25 (3d Cir. May 26, 1995) (actions not rationally related to a legitimate government interest or deliberate interference with the process for reasons unrelated to the merits of the application); *Scott v. Greenville County,* 716 F.2d 1409, 1420 (4th Cir. 1983) (focusing on "singling out a permit applicant for adverse treatment due to illegitimate 'political' or, at least, personal motives," *citing Cordeco Dev. Corp. v. Vasquez,* 539 F.2d 256, 260 (1st Cir.), *cert. denied,* 429 U.S. 978 (1976)); *Shelton v. City of College Station,* 780 F.2d 475, 479-80, 483 (5th Cir.) (*Euclid/Nectow* "legitimate government interest" standard), *cert. denied,* 477 U.S. 905; 479 U.S. 822 (1986); *Pearson v. City of Grand Blanc,* 961 F.2d 1211, 1224 (6th Cir. 1992) (denial of rezoning or variances did not violate substantive due process rights where concerns about traffic are rationally related to goals of zoning, a legitimate government

interest); *Coniston Corp. v. Village of Hoffman Estates,* 844 F.2d 461, 466-67 (7th Cir. 1988) (First Circuit's determination in *Creative Environments* read as consistent with *Euclid's* "legitimate government interest" formulation); *Chesterfield Dev. Corp. v. City of Chesterfield,* 963 F.2d 1102, 1104 (8th Cir. 1992) agreeing with First Circuit's statement in *Creative Environments,* 680 F.2d at 833, that "the conventional planning dispute — at least when not tainted with fundamental procedural irregularity, racial animus, or the like — which takes place within the framework of an admittedly valid state subdivision scheme is a matter primarily of concern to the state and does not implicate the Constitution"); *Dodd v. Hood River City,* No. 93-35207, slip op. at 7639 (9th Cir. June 29, 1995) (*Euclid* "legitimate government interest" standard); *Jacobs, Visconi & Jacobs v. City of Lawrence,* 927 F.2d 1111, 1119-20 (10th Cir. 1991) (*Euclid* standard applied to find denial of rezoning application on grounds that suburban mall would defeat goal of protecting vitality of downtown business district a determination related to a legitimate government purpose); *Edie v. Sarasota County,* 908 F.2d 716, 721 (11th Cir. 1990) (*Nectow* "legitimate government interest" standard), *cert. denied,* 498 U.S. 1120 (1991); *Silverman v. Barry,* 845 F.2d 1072, 1087 (D.C. Cir.) ("Whatever the confusion and delay, the District was in pursuit of a legitimate government interest"), *cert. denied,* 488 U.S. 956 (1988).

Applying the *Euclid/Nectow* touchstone of "legitimate government interest", the Fifth Circuit observed that, "[t]his standard, though not always fully elaborated, has in practice been uniformly followed in zoning cases." *Shelton,* 780 F.2d at 483. Similarly, the Seventh Circuit, reading the First Circuit's decision in *Creative Environments* as synonymous with *Euclid's* deferential "legitimate government interest" standard, declared, "No one thinks substantive due process should be interpreted so broadly as to protect landowners against erroneous zoning decisions." *Coniston Corp.,* 844 F.2d at 466.

Even those decisions cited by Petitioner as evincing most concern with linguistic tensions between court of appeals decisions recognize a universal deference among federal circuit courts to local boards and officers when reviewing local administrative land use actions. *Pearson,* 961 F.2d at 1222; *Littlefield v. City of Afton,* 785 F.2d 596, 607 (8th Cir. 1986). The Sixth Circuit, in *Pearson,* for instance, concluded that the "shocks the conscience" terminology, employed in decisions of the Sixth and First Circuits as well as this Court, *see Rochin v. California,* 342 U.S. 165, 172 (1952),

> is useful in the zoning context ... to emphasize the degree of arbitrariness required to set aside a zoning decision by a local authority — and to understand the overriding precept that "arbitrary and capricious" in the federal substantive due process context means something far different than in state administrative law.

Pearson, 961 F.2d at 1222.

Indeed, even the Eighth Circuit, which once characterized the First Circuit as out of step, has today embraced the First Circuit's terminology, joining other circuits which, in practice, were always in harmony with the First Circuit. *See* cases cited in *Littlefield,* 785 F.2d at 605-07.[13]

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13. Perhaps the only irreconcilable example cited by *Littlefield,* 785 F.2d at 60, was *Shelton v. City of College Station,* 754 F.2d at 1256-57, *overturned en banc,* 780 F.2d 475 (5th Cir.) *cert. denied,* 477 U.S. 905 (1986) shortly after publication of the *Littlefield* decision. *Littlefield,* itself, has fallen into disrepute as subsequent decisions of the Eighth Circuit have moved into harmony with First Circuit terminology. *See Chesterfield Dev. Corp.,* 963 F.2d at 1104-05; *Lemke v. Cass County, Nebraska,* 846 F.2d 469, 470-71 (8th Cir. 1987).

In short, Petitioner has offered nothing to suggest that this case would be decided differently by the federal court of appeals of any circuit. Employing the analysis common to all circuits, the Supreme Judicial Court found that there was no "deliberate flouting of the law," "no evidence of personal animus, that other developers were treated more favorably than the [Petitioner], or that board members stood to profit personally from their actions." (Petitioner's App. A-17). The Board's members "were motivated by doubts about the safety of the intersection, a legitimate area of concern for local planning boards. *See* G.L. c. 41, § 81M." *Id.*

> A local planning board, whose functions are in many respects discretionary and which involve the interpretation and application of highly technical laws and regulations, should be allowed to address matters within its realm of responsibility without exposure to liability under the Act every time its actions are overturned.

(Petitioner's App. A-20) (addressing arguments under the Massachusetts Civil Rights Act, modeled after 42 U.S.C. § 1983).

It has often been observed and repeated that the role of federal courts "is not and should not be to sit as a zoning board of appeals." *Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting); *Raskiewicz v. Town of New Boston*, 754 F.2d 38, 44 (1st Cir. 1985). Since the present case presents no more than the garden variety land use dispute eschewed by all circuits as outside the realm of substantive due process, no conflict between state or federal standards is demonstrated and the Petition should be denied.

III.

THIS CASE DOES NOT PRESENT AN APPROPRIATE RECORD TO RESOLVE REAL OR PERCEIVED VARIATIONS IN THE CIRCUIT COURTS' ARTICULATION OF THE STANDARD FOR SUBSTANTIVE DUE PROCESS CLAIMS WHERE, TO AVOID A MANIFESTLY UNJUST RESULT TO THE RESPONDENTS, REVERSAL OF THE STANDARD APPLIED WOULD NECESSITATE EXAMINATION OF PROCEDURAL ISSUES BY WHICH THE SUPREME JUDICIAL COURT DECLINED TO ADDRESS THE EXISTENCE OF A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST PREREQUISITE TO A SUCCESSFUL SUBSTANTIVE DUE PROCESS CLAIM.

When the Supreme Judicial Court, on the basis of the parties' reliance on cases from the First Circuit in forming their requests for jury instructions and other contentions to the judge,[14] canvassed the trial record in search of a sufficient basis to support Petitioner's substantive due process claim, it assumed but did not hold that the Petitioner had a property right in approval of the plan. (Petitioner's App. A-13, n.14). The court noted Respondents' position that Petitioner had no legitimate entitlement — and hence no constitutionally protected property interest — in subdivision plan approval, during the period encompassed by his claim, under the elaborate state framework for exercise of planning board discretion (*see* Petitioner's App. A-20), but stated:

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14. Indeed, the Petitioner relied exclusively on the First Circuit's articulations of the threshold applied to substantive due process claims in its arguments to the Supreme Judicial Court as well. *See* discussion, *supra*, Part I.A.

> [w]e do not consider whether this contention is correct, because, *in its present, highly detailed guise*, it does not resemble any argument made to the judge below. . . . Thus, we agree with the plaintiff's contention that the defendants' motions for directed verdict and for judgment notwithstanding the verdict failed to preserve this issue, *in this form*, for appeal.

(Petitioner's App. A-13 - A-14, n.14) (emphasis added).[15]

The Respondents did indeed challenge, at every juncture, the sufficiency of Petitioner's evidence to establish a constitutionally protected property right,[16] arguing as early as on motion for

15. The issue, however, may still be raised in this Court in support of the judgment below. *Dandridge v. Williams*, 397 U.S. 471, 475-76 n.6 (1970). An appellee need not appeal or cross-appeal in order to "urge in support of a decree any matter appearing in the record, although his argument may invoke an attack upon the reasoning of the lower court or an insistence upon matters overlooked or ignored by it." *United States v. American Ry. Express Co.*, 265 U.S. 425, 435-36 (1924). "The prevailing party may . . . assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court." *Dandridge*, 397 U.S. at 475-76 n.6 (1970). The principal is sometimes called the Langnes doctrine, based upon *Langnes v. Green*, 282 U.S. 531 (1931), which discusses the subject at length. To protect the Respondents' rights, however, a conditional cross-petition has been filed on this point. *See* Cross-Petitioners/Respondents' Conditional Cross-Petition for Writ of Certiorari, *Freeman v. Town of West Boylston, et al.*, (United States Supreme Court) (No. 95-145) [hereinater "Cross-Petitioners/Respondents' Conditional Cross-Petition"]; *see generally*, Stern, Gressman, Shapiro and Geller, Supreme Court Practice 368 (7th Ed. 1993); R. Stern, *When to Cross-Appeal or Cross-Petition — Certainty or Confusion*? 87 Harv. L. Rev. 763, 773-74 (1974).

16. The crux of the property right analysis, as has been presented by Respondents, is that Petitioner's burden was to demonstrate during the (Cont'd)

summary judgment that Petitioner was unable to meet his burden of establishing a "legitimate entitlement" to subdivision plan approval pursuant to Mass. Gen. L. ch. 41, § 81K, *et seq.* as an essential element of his case. (Supp. R. 8-9, 25-26). The argument

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(Cont'd)
relevant period a legitimate claim of entitlement to subdivision plan approval "grounded in state law." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982). No such entitlement was created or recognized by the superior court judge's remand to the planning board because, under black letter Massachusetts law, planning board disapproval is valid where any single valid basis for disapproval has been identified and the reviewing authority therefore has no authority to annul it. *Fairbairn v. Planning Bd. of Barnstable*, 5 Mass. App. Ct. 171, 179 (1977); *Loring Hills Developers Trust v. Planning Bd. of Salem*, 374 Mass. 343, 352 (1978). In this instance, the Superior Court upheld the disapproval on two valid grounds — drainage and the absence of Board of Health review — and could not substitute its discretion for that of the board even had it found no supportable basis for disapproval. *Strand v. Planning Bd. of Sudbury*, 5 Mass. App. Ct. 18, 22-24 (1977). Once planning board disapproval of a plan has been upheld, an applicant who wishes to proceed must reapply to the board in a manner that meets all the requirements of the SCL and complies with all regulations in effect on the date of application (in this instance, amendments to the Board's rules and regulations imposing greater sight distance requirements) (R. 153-64; 173-78). He must also obtain board of health approval of the new plan, and submit to a public hearing designed to afford abutters an opportunity to participate and, if need be, appeal, the new plan. *Strand*, 5 Mass. App. Ct. at 23; *Poulos v. Planning Bd. of Braintree*, 413 Mass. 359, 359-60 (1992); *Patelle v. Planning Bd. of Woburn*, 6 Mass. App. Ct. 951, 952 (1978); *Doeblin v. Dinkham Dev. Corp.*, 7 Mass. App. Ct. 720, 721 (1979); Mass. Gen. L. ch. 41, § 81T. (*See* Petitioner's App. A-39). As the Petitioner did not take these steps, and, in fact, delayed plan approval by refusing to submit to the required public hearing (Petitioner's App. A-40), he had no legitimate claim of entitlement to subdivision plan approval, and thus no property right in approval of his plan, during the period about which he complains. In addition, since Petitioner sought a waiver of a through street requirement of the Board's rules and regulations, he had no entitlement to plan approval unless and until the Board exercised its discretion to grant such waiver. Mass. Gen. L. ch. 41, § 81R; *Mac-Rich*, 4 Mass. App. Ct. at 85. (Petitioner's App. A-16).

was developed through trial examination (T.T. 237-38)[17], set forth by motion for directed verdict (App., *infra*, 11a-19a), and at length during arguments on motions for directed verdict (T.T. 757, 775-78, 796-97, 800) and motions for judgment notwithstanding the verdict (Supp. R. 32, n.2), and, indeed acknowledged in the Superior Court's instructions to the jury. (App., *infra*, 8a-10a).

In their motion for directed verdict, Respondents stated, in pertinent part:

> [T]he plaintiff . . . has established *neither a property right* nor evidence of the type of oppressive abuse of power which could arguably implicate the due process clause. *The plaintiff has failed to establish a property right* sufficiently definite to trigger the due process clause *since he had no right to an approval of his plan until* the drainage aspect was approved *after the second public hearing* in May, 1988. Prior to that time, the drainage plan he submitted did not *comply with the Board's regulations* and he had no right to subdivide his property *until* he satisfied the Board on that issue and *after a public hearing was held as required by law and until the abutter's appeal was disposed of.*

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17. At trial Petitioner's prior attorney admitted that "[t]he law *did* require a public hearing . . . prior to final approval of the plan," that abutters had an absolute right to appeal from such a hearing, and that the judge had ruled that the law required a public hearing prior to subdivision plan approval (T.T. 237-39) (emphasis added). By this testimony, Petitioner's former counsel also admitted that the advice of the Board's counsel that there was no need for a public hearing, the very advice Petitioner seeks, at 6, to chastise Respondents for "flagrantly disregarding," was erroneous.

(App., *infra*, 12a) (emphasis added).

Petitioner's burden to establish a property interest in subdivision plan approval is so integral to the analysis of his substantive due process claim that it infuses other aspects of substantive due process analysis as well in the decision below, despite assertions to the contrary. (Petitioner's App. A-14). For example, in focusing upon the rationality of the planning board's action, the Supreme Judicial Court acknowledged a degree of discretion antithetical to an entitlement by Petitioner:

> [N]owhere in [the judge's written decision on plan disapproval] was it suggested that the board had forfeited the right to insist on compliance with the through street requirement. * * * Moreover, . . . town counsel . . . indicated that the topic [of intersection design] remained open for discussion. . . . The board's consulting engineer forcefully contended . . . that the board retained the authority to insist on improvements to the intersection. * * * [A]s late as March, 1988, the judge agreed with the board's position to the extent of ordering a new public hearing, and declined to instruct the board that it must confine itself to considering the drainage issue.
>
> *Most importantly * * * the board . . . did not attempt to deny the [Petitioner] the approval to which at some point, he was entitled, and did not cause him the loss of his property.*

(Petitioner's App. A-15 - A-16) (emphasis added).

To reach the property right issue directly entails an excursion across the state procedural law landscape to determine whether an essential element of Petitioner's federal claim can be decided against Respondents, not on the basis of an outright waiver of the property right issue or argument, but rather on the basis of lack of detail in its form or presentation. (Petitioner's App. A-14).[18] Should certiorari be granted, the interests of justice would certainly demand such an excursion, since a new articulation of the threshold for substantive due process claims without inquiry into the existence of a constitutionally protected property right could potentially result in the reimposition of substantial monetary damages upon a public entity and public officials who have effectuated no constitutional deprivation. *See* Respondents' Conditional Cross-Petition.

Even so, the case does not present an appropriate record to resolve real or perceived verbal tensions in the standard for substantive due process applied by federal courts where the true focus of the matter lies in the degree of entitlement to plan approval possessed by Petitioner under a comprehensive state subdivision law which bestows extensive discretion upon planning boards. (*See* Petitioner's App. A-20). Therefore, the writ should be denied.

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18. In Massachusetts, a party who moves for a directed verdict pursuant to Mass. R. Civ. P. 50(a) challenging the adequacy of the evidence presented — in this case the adequacy of Petitioner's proffered evidence of property right in subdivision–plan approval — and who then moves for judgment notwithstanding the verdict on the same grounds after the jury returns an adverse verdict, has adequately preserved the issue for appellate review. *See, e.g., International Fidelity Ins. Co. v. Wilson,* 387 Mass. 841, 846 (1983); *Tucker v. Badoian,* 376 Mass. 907, 916 (1978); *Connors v. New England Telephone & Telegraph Co.,* 22 Mass. App. Ct. 243, 244 (1986); *see also, Brighetti v. Consolidated Rail Corp.,* 20 Mass. App. Ct. 192, 196 n.4 (1985) (no waiver of issue for appeal when particular issue is subject of motion for directed verdict and judgment notwithstanding the verdict; no objection to jury instruction(s) is necessary).

IV.

THIS CASE DOES NOT PRESENT AN APPROPRIATE RECORD TO RESOLVE REAL OR PERCEIVED VARIATIONS IN THE CIRCUIT COURTS' ARTICULATION OF THE STANDARD FOR SUBSTANTIVE DUE PROCESS CLAIMS WHERE QUALIFIED IMMUNITY AND THE ABSENCE OF AN IMPERMISSIBLE PATTERN, PRACTICE OR POLICY PROVIDE INDEPENDENT GROUNDS TO SUSTAIN THE JUDGMENT BELOW.

A. Foreman and Greenough Are Shielded by Qualified Immunity.

Because the Supreme Judicial Court determined that no deprivation of Petitioner's alleged property right in violation of substantive due process occurred, it did not reach Respondents' additional argument that the individually-named defendants, Charles Greenough and Kathleen Foreman, were entitled to qualified immunity. (Petitioner's App. A-21). As a matter of law, however, the individuals in question are immune from liability under 42 U.S.C. § 1983.

"[G]overnment officials performing discretionary functions generally are shielded from liability [under 42 U.S.C. § 1983] for civil damages insofar as their conduct does not violate *clearly established statutory or constitutional rights of which a reasonable person would have known.*" *Harlow v. Fitzgerald,* 437 U.S. 800, 817-18 (1982) (emphasis added). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton,* 483 U.S. 635, 640 (1987).

The applicable standard being an objective one, the question of whether the right claimed to be protected by the constitution or

by statute is "clearly established" is one of law for the court, not the jury. *Siegert v. Gilley*, __ U.S. __, 111 S. Ct. 1789, 1793 (1991) (determination of existence of clearly established right at time of defendant's conduct is a "purely legal" threshold immunity question).

In this case, the trial court erred as a matter of law in submitting the issue of qualified immunity to the jury (T.T. 977, 985-89) as well as failing to grant Respondents Foreman and Greenough's motions for directed verdict and for judgment notwithstanding the verdict on the basis of qualified immunity. Despite Petitioner's repeated efforts to characterize the Respondents' authority under the SCL as lacking discretion, the Respondents' actions in subdivision plan review are highly discretionary in nature, as noted by the Supreme Judicial Court. (Petitioner's App. A-20).

More importantly "[o]fficials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision." *Davis v. Scherer*, 468 U.S. 183, 194 (1984). Charges that substantive due process has been denied carry with them a burden by which a plaintiff must show a due process deprivation of *constitutional* dimension. *See Davis*, 468 U.S. at 194. A defense of qualified immunity need not go even that far; Respondents may insure safe passage on such defense merely by showing that, given the state of the law in 1986, reasonable officials would not have known that the actions in question amounted to a deprivation of a plaintiff's *constitutional* rights. *Amsden v. Moran*, 904 F.2d 748, 757 (1st Cir. 1990), *cert. denied*, 498 U.S. 1041 (1991).

Whether the Planning Board correctly applied the SCL is strictly a matter of Massachusetts law. *See Amsden*, 904 F.2d at 757. Both Foreman and Greenough testified that the Board was

confused by the remand order (T.T. 436, 430, 734) and believed there were additional discretionary decisions open to the Board under the judge's order (T.T. 481). They were advised by counsel that the interim order was still subject to challenge (T.T. 502; R. 275-76) and were confirmed in those views by the judge herself, who ultimately clarified or reversed her earlier position on the need for and scope of a public hearing on the revised plan in her March 18, 1988 order. (Petitioner's App. A-39 - A-40). As such, the interim judgment of October 17, 1986 was not clear, established, legally correct or even final as a matter of state law and hardly a vehicle by which reasonable officials would have had even an inkling that the actions in question amounted to a deprivation of Petitioner's *constitutional* rights.

The Respondents Foreman and Greenough's motions for directed verdict and judgment notwithstanding the verdict should have been granted by the trial court and the Supreme Judicial Court's Judgment below is independently sustainable on the basis of qualified immunity.

B. No Pattern, Practice or Policy Implicates the Town.

In order to establish a claim against the Town under 42 U.S.C. § 1983, the Petitioner must allege and prove that the Town maintains an official policy, custom, or usage which, when implemented, acts as a causal link to deprive a person of a constitutionally protected right. *Monell v. Department of Social Services of New York*, 436 U.S. 658, 691 (1978). Since there is no trial evidence whatsoever as to any pattern, practice or policy of impermissible delays or deprivations by the Board or any condonation of the same by the Town, *City of St. Louis v. Praprotnik*, 45 U.S. 112 (1988), as to the Petitioner or others and since ample statutory avenues of redress in any case exist under State law, Mass. Gen. L. ch. 41, § 81BB, no deprivation, causal link or pattern has been demonstrated. The Respondent Town's motions for directed verdict and judgment notwithstanding the

verdict should have been granted by the trial court and the Supreme Judicial Court's Judgment below is independently sustainable on this basis as well.

This matter is, therefore, not an appropriate vehicle to reach any real or perceived tensions in the standard for substantive due process articulated by federal courts of appeals and the writ should be denied.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A — EXCERPTS OF RELEVANT PROVISIONS OF THE MASSACHUSETTS SUBDIVISION CONTROL LAW

Mass. Gen. L. ch. 41, § 81M (1994) provides, in pertinent part:

> The subdivision control law has been enacted for the purpose of protecting the safety, convenience and welfare of the inhabitants of the cities and towns in which it is, or may hereafter be, put in effect by regulating the laying out and construction of ways in subdivisions providing access to the several lots therein, but which have not become public ways, and ensuring sanitary conditions in subdivisions . . . . The powers of a planning board . . . under the subdivision control law shall be exercised with due regard for the provision of adequate access to all of the lots in a subdivision by ways that will be safe and convenient for travel; for lessening congestion in such ways and in the adjacent public ways; for reducing danger to life and limb in the operation of motor vehicles; for securing safety in the case of fire, flood, panic and other emergencies; for insuring compliance with the applicable zoning ordinances or by-laws; for securing adequate provision for water, sewerage, drainage, underground utility services, fire, police, and other similar municipal equipment, and street lighting and other requirements where necessary in a subdivision; and for coordinating the ways in a subdivision with each other and with the public ways in the city or town in which it is located and with the ways in neighboring subdivisions. . . . It is

> the intent of the subdivision control law that any subdivision plan filed with the planning board shall receive the approval of such board if said plan conforms to the recommendation of the board of health and to the reasonable rules and regulations of the planning board pertaining to subdivisions of land; provided, however, that such board may, when appropriate, waive, as provided for in section eighty-one R, such portions of the rules and regulations as is deemed advisable.

Mass. Gen. L. ch. 41, § 81O (1994) provides, in pertinent part:

> No person shall make a subdivision of any land in any city or town in which the subdivision control law is in effect unless he has first submitted to the planning board of such city or town for its approval a plan of such proposed subdivision, showing the lots into which such land is to be divided and the ways already existing or which are to be provided by him for furnishing access to such lots, and the planning board has approved such plan in the manner hereinafter provided.

Mass. Gen. L. ch. 41, § 81Q (1994) provides, in pertinent part:

> After a public hearing . . . a planning board shall adopt, and . . . may, from time to time, amend, reasonable rules and regulations relative to subdivision control not inconsistent with the subdivision control law or with any other

> provisions of a statute or of any valid ordinance or by-law of the city or town.

Mass. Gen. L. ch. 41, § 81R (1994) provides, in pertinent part:

> A planning board may in any particular case, where such action is in the public interest and not inconsistent with the intent and purpose of the subdivision control law, waive strict compliance with its rules and regulations . . . .

Mass. Gen. L. ch. 41, § 81T (1994) provides, in pertinent part:

> Before approval, modification and approval, or disapproval of the definitive [subdivision] plan is given, a public hearing shall be held by the planning board, notice of the time and place of which and of the subject matter, sufficient for identification, shall be given by the planning board at the expense of the applicant by advertisement in a newspaper of general circulation in the city or town once in each of two successive weeks, the first publication being not less than fourteen days before the day of such hearing or if there is no such newspaper in such city or town then by posting such notice in a conspicuous place in the city or town hall for a period of not less than fourteen days before the day of such hearing, and by mailing a copy of such advertisement to the applicant and to all owners of land abutting upon the land included in such plan as appearing on the most recent tax list.

Appendix A

Mass. Gen. L. ch. 41, § 81U (1994) provides, in pertinent part:

> When a definitive plan of a subdivision is submitted to the planning board, as provided in section eighty-one O, a copy thereof shall also be filed with the board of health or board or officer having like powers and duties. Such health board or officer shall, within forty-five days after the plan is so filed, report to the planning board in writing, approval or disapproval of said plan, and, in the event of disapproval, shall make specific findings as to which, if any, areas shown on such plan cannot be used for building sites without injury to the public health, and include such specific findings and the reasons therefor in such report, and where possible, shall make recommendations for the adjustments thereof. Failure of such board or officer to report shall be deemed approval by such board or officer. Such health board or officer shall send a copy of such report, if any, to the person who submitted said plan.
>
> * * *
>
> After the hearing required by section eighty-one T and after the report of said health board or officer or lapse of forty-five days without such report, the planning board shall approve, or, if such plan does not comply with the subdivision control law or the rules and regulations of the planning board or the recommendations of the health board or officer, shall modify and approve or shall disapprove such plan. In the event of disapproval,

> the planning board shall state in detail wherein the plan does not conform to the rules and regulations of the planning board or the recommendations of the health board or officer and shall revoke its disapproval and approve a plan which, as amended conforms to such rules and regulations or recommendations. The planning board shall file a certificate of its action with the city or town clerk, a copy of which shall be recorded by him in a book kept for the purpose, and shall send notice of such action by registered mail, postage prepaid, to the applicant at his address stated on the application.

Mass. Gen. L. ch. 41, § 81W (1994) provides, in pertinent part:

> A planning board, on its own motion or on the petition of any person interested, shall have power to modify, amend or rescind its approval of a plan of a subdivision, or to require a change in a plan as a condition of its retaining the status of an approved plan. All of the provisions of the subdivision control law relating to the submission and approval of a plan of a subdivision shall, so far as apt, be applicable to the approval of the modification, amendment or rescission of such approval and to a plan which has been changed under this section.

Mass. Gen. L. ch. 41, § 81BB (1994) provides, in pertinent part:

> Any person, whether or not previously a party

to the proceedings, or any municipal officer or board, aggrieved by a decision of a board of appeals under section eighty-one Y, or by any decision of a planning board concerning a plan of a subdivision of land, or by the failure of such a board to take final action concerning such a plan within the required time, may appeal to the superior court for the county in which said land is situated or to the land court pursuant to the provisions of clause (k) of section one of chapter one hundred and eighty-five; provided, that such appeal is entered within twenty days after such decision has been recorded in the office of the city or town clerk or within twenty days after the expiration of the required time as aforesaid, as the case may be, and notice of such appeal is given to such city or town clerk so as to be received within such twenty days. The court shall hear all pertinent evidence and determine the facts, and upon the facts so determined, shall annul such decision if found to exceed the authority of such board, or make such other decree as justice and equity may require. The foregoing remedy shall be exclusive, but the parties shall have all rights of appeal and exceptions as in other equity cases.

* * *

All issues in any proceeding under this section may be advanced for speedy trial over other civil actions and proceedings.

APPENDIX B — EXCERPTS FROM THE TRIAL TRANSCRIPT [HEREINAFTER "T.T."]

(Portion of Charge Conference T.T. 833-34)

[833] deprivation of due process.

Now, obviously, I'm going to hopefully say it in a little more articulate and flowing style than I've just given it to you, but basically that's where it's coming from.

Stopping for the moment, if I can put my hands on it, I notice that you, Mr. O'Connor, have asked me to, in your Number 26 and 27, you've asked me to deal with whether the defendants acted intentionally or recklessly or merely negligently and you've asked for specific instructions in 31 and 32 of what is meant by intentional and reckless and what is meant by negligent.

None of the cases that dealt with this issue of alleged administrative body misconduct that I recall got into this at all, other than those cases in which there is some suggestion of personal animus or racial difficulties or something of that sort, none of which, I suggest, that I've heard any evidence on in this case in terms of personal motivation to injure this plaintiff.

I'd like your comments on that. I have to say the cases, and I've looked at countless cases [834] at this point, and the PFZ case seems to be the latest pronouncement of the First Circuit on this issue, so have you any comments on that? Do you object to this, or how do you feel about it?

MR. O'CONNOR: Your Honor, I think that if you set the standard in the PFZ case, then I think that's probably — I'll agree to that.

Appendix B

THE COURT: All right, thank you.

I will have — within thirty minutes of the time the jury goes out there's a going to be a question coming back, indeed if I don't get it before they leave the box, saying, "What on earth does that mean," and at that point in time I'm going to get you two gentlemen together and I'm going to say, okay, now what do I tell them, because I haven't the faintest idea how to articulate it any more clearly than — or I should say, using the word "clearly" in quotes, than our Courts have done up till now, and frankly I would be very hesitant to try, because they seem to be unsettled in just how they put it.

I saw one other case, and it was the case that finally satisfied me that there wasn't any way I was going to be able to say it any better,

* * *

(Portion of Jury Instructions T.T. 970-72)

[970] merely, and I keep saying merely, arbitrary in doing or undertaking the duties of a Planning Board enough. Neither is mere bad faith alone necessarily tantamount or equal to a violation of the plaintiff's due process rights.

Not every violation by a government body of someone's property rights rises to the level of a violation of due process. It must be of such a nature as I mentioned to you a moment ago. Namely, it's government power being used for purposes of oppression, abuse of government power that shocks the conscience, or action that is legally irrational in that it is not sufficiently keyed to any legitimate interest of the Town of West Boylston.

Appendix B

Now, you may ask yourself, well, what is a property right in the context that I am now using it? Bear with me just for a moment.

The plaintiff's claim for a property right here is basically on his assertion that he has a right to have a subdivision plan approved if it conforms to the rules and regulations of the Planning Board and recommendations of the Board of Health.

[971] The statute on this, the Massachusetts statute which governs the actions of a Planning Board, requires that any subdivision plan filed with the Planning Board shall receive the approval of such Board if the plan conforms to the recommendations of the Board of Health and to the reasonable rules and regulations of the Planning Board pertaining to subdivisions of land. Before, however, such approval is required, there are certain procedural steps that must be followed, including, without trying to spell them all out, but notice to the Town Clerk, for example. A public hearing must be held which is advertised in the local paper for two weeks, and there are certain notices posted in the Town Hall of the public hearing, and a mailing of notice regarding that public hearing to the applicant and the abutters, so that it just doesn't happen automatically, you send the plan in and the Planning Board looks at it and says, yeah, that conforms, bang, out it goes. It doesn't work that way. You have to go through these procedures, as well, but if you do, that section of the statute cuts in and tells us that if it does, in fact, conform to the recommendations of the Board of [972] Health, and there was evidence in this case regarding that, and to the reasonable rules and regulations of the Planning Board, then the Planning Board must approve it.

A Planning Board does not have the freedom to disapprove a

plan which complies with the rules and regulations of the Board merely because the Board feels disapproval would be in the public interest.

Now, you've also heard testimony about the Court Order issued here, and I want to say something with respect to that, as well.

When a Massachusetts Superior Court Judge issues an Order requiring a person or a Board or any other entity to take certain action or to refrain from taking certain action, I instruct you that the person or entity to whom that Order is directed is required by law to comply with the Court's Order.

However, I should also add, as I mentioned to you a moment ago, failure to comply with that Order, of itself alone, is not a violation of the plaintiff's due process rights, unless it comes to and adds up to that standard that I gave you a few moments ago, namely, it is the use of governmental

* * *

APPENDIX C—EXCERPTS FROM THE RECORD BELOW:

Respondents Foreman and Greenough's
Motion for Directed Verdict Filed September 8, 1992

COMMONWEALTH OF MASSACHUSETTS
Worcester, ss

Superior Court
Department of the Trial
Court of the Commonwealth
Civil Action
No. 88-3632

ELIOT R. FREEMAN,

Plaintiff

vs.

TOWN OF WEST BOYLSTON, PLANNING BOARD OF THE TOWN OF WEST BOYLSTON, KATHLEEN FOREMAN, GEORGE [SIC] GREENOUGH, WILLIAM FORREST AND LINWOOD PERRY, Individually and as they are MEMBERS OF THE PLANNING BOARD OF THE TOWN OF WEST BOYLSTON AND VICTOR CUSANELLO AS HE IS A MEMBER OF THE PLANNING BOARD,

Defendants

Appendix C

MOTION FOR DIRECTED VERDICT OF DEFENDANT [SIC] KATHLEEN FOREMAN AND CHARLES GREENOUGH AS THEY ARE MEMBERS OF THE WEST BOYLSTON PLANNING BOARD

The plaintiff has filed an action seeking damages against Charles Greenough and Kathleen Foreman individually. There is insufficient evidence from which a jury could conclude that Mr. Greenough or Mrs. Foreman engaged in conduct which deprived the plaintiff of his constitutional right to substantive or procedural due process. Procedural due process is satisfied in land use dispute as long as the state provides a system for a hearing for review by the Court for correction of errors at the Board level. See *Rosenfeld v Board of Health of Chilmark*, 27 Mass App Ct 621 (1989). Furthermore, the plaintiff has failed to present sufficient evidence to warrant a jury in finding a substantive due process violation because he has established neither a property right nor evidence of the type of oppressive abuse of power which could arguably implicate the due process clause. The plaintiff has failed to establish a property right sufficiently definite to trigger the due process clause since he had no right to an approval of his plan until the drainage aspect was approved after the second public hearing in May, 1988. Prior to that time, the drainage plan he submitted did not comply with the Board's regulations and he had no right to subdivide his property until he satisfied the Board on that issue and after a public hearing was held as required by law and until the abutter's appeal was disposed of. Also any language on the June 24, 1988 decision as to supplying data as to the safety of the intersection even if erroneously inserted in the decision, was no harm to Mr. Freeman since he could not develop his property until the abutter's appeal was resolved. Mass. G.L.c. 41, §81V.

Secondly, there is insufficient evidence of a substantive due process violation even if it is assumed that the plaintiff had a property right to approval at some point in the process. The plaintiff has not established evidence of abuse of governmental power for purposes of oppression or abuse of power which shocks the conscience or action that is legally irrational without it is not sufficiently keyed to any legitimate state interest. *PFZ Properties v Rodriguez*, 923 F2d 28 (lst Cir. 1991). See *Miga v Hoyoke*, 398 Mass 343 (1986). There is no evidence of improper financial or personal motive for Board action. *Id.* See also *Bello v Walker*, 840 F2d 1124 (3d Cir. 1988). Nor has the plaintiff been deprived of anything to which the due process clause could respond since mere fluctuations in value during the process of governmental decision making is not compensable absent extraordinary circumstances. *Wilson v Commonwealth*, 31 Mass App Ct 757 (1992) aff'd 413 Mass 352 (1992). Accordingly, the plaintiff has failed to establish enough to warrant submission of the 1983 claim to the jury.

Thirdly, there is no evidence that Greenough and Foreman engaged in conduct which interfered with the plaintiff's civil rights by threat, coercion or intimidation and therefore the plaintiff cannot recover under Count II. *Rodriguez v Furtado*, 410 Mass 878 (1991).

Fourthly, Greenough and Foreman, if not entitled to absolute immunity, is entitled to qualified immunity from damages for discretionary acts undertaken in his role as a member of the Planning Board. *Harlow v Fitzgerald*, 457 U.S. 800 (1982); *Rodriguez v Furtado*, 410 Mass 878 (1991). The plaintiff cannot overcome such immunity because the plaintiff cannot and did not introduce evidence that defendants Greenough and Foreman did anything to which violated Freeman's "clearly established"

constitutional rights. Freeman cannot show that he had any clearly established constitutional due process right which was violated by defendants Greenough and Foreman. Rather cases such as *Chaplin Enterprises v City of Lebanon*, 712 F2d 1526 (1st Cir 1983); *Chongris v Board of Appeals of Andover*, 811 F2d 36 (1st Cir. 1987), clearly establish that Freeman's due process rights were not violated at all as there is a state procedure to review and remedy error of law made by local land use agencies. Therefore, the plaintiff cannot recover for these reasons as well as the reasons set forth in the joint motion for directed verdict submitted on behalf of all defendants.

By his attorney,

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Dated: 9/18/92

Appendix C

Respondent Town of West Boylston's Motion for Directed Verdict, Filed September 8, 1992

COMMONWEALTH OF MASSACHUSETTS
Worcester, ss

Superior Court
Department of the Trial
Court of the Commonwealth
Civil Action
No. 88-3632

ELIOT R. FREEMAN,

Plaintiff

vs.

TOWN OF WEST BOYLSTON, PLANNING BOARD OF THE TOWN OF WEST BOYLSTON, KATHLEEN FOREMAN, GEORGE [SIC] GREENOUGH, GEORGE BERNARDIN, WILLIAM FORREST, BRUCE J. PENNINO AND LINWOOD PERRY, Individually and as they are MEMBERS OF THE PLANNING BOARD OF THE TOWN OF WEST BOYLSTON and MICHAEL RAFFERTY in his capacity as CONSULTING ENGINEERING [SIC] FOR THE PLANNING BOARD OF THE TOWN OF WEST BOYLSTON,

Defendants

Appendix C

MOTION OF DEFENDANT WEST BOYLSTON PLANNING BOARD AND TOWN OF WEST BOYLSTON FOR DIRECTED VERDICT

The defendant Town of West Boylston moves for directed verdict as to both counts and states the following grounds.

1. The plaintiff has failed to present evidence from which a trier of fact would be warranted in finding that the plaintiff's constitutional right to due process was denied by any party to this case. See *Alton Land Trust v Alton*, 745 F2d 730 (1st Cir 1984).

2. The plaintiff has failed to present evidence that the defendant Town of West Boylston engaged in any conduct from which a trier of fact would be warranted in concluding that the plaintiff's civil rights were interfered with by threats, coercion or intimidation under Mass G.L.c. 12, §11I.

3. Even if the plaintiff presented sufficient evidence to warrant a finding that the plaintiff's rights to procedural due process were violated, there is no *respondent superior* liability against the town under 42 USC §1983 from which a jury would be warranted in concluding that any such violation of constitutional rights was caused by a policy of custom of the town adopted by government officials authorized to make such policy. See *St. Louis v Propotnik*, 485 U.S. 112 (1988). Further there is no evidence of a general policy which works an unconstitutional deprivation of due process in its implementation by the town. *Id.*

4. Even if the plaintiff presented sufficient evidence from which a jury could conclude that an individual defendant or

defendants interferred with the plaintiff's civil rights by threats, intimidation or coercion, there was insufficient evidence to warrant a finding that the town was responsible for actions of the individuals who were found to have interfered with the plaintiff's civil rights by intimidations or coercion. *Cf Breault v Chairman of the Board of Fire Comm'rs of Springfield*, 401 Mass 26 (1987) at n.1 (Summary Judgment granted as to City of Springfield and denied as to individuals who may have violated statute). The Supreme Judicial Court has not yet ruled that the doctrine of *respondent superior* applies to make a municipality liility tr isolated acts of town elected officials. See *Rodriquez v Furtado*, 410 Mass 878, 889 n. (1991) (Mass has not decided if the *Monell* standard requiring the existence of government policy which coercec etc., applies under G.L.c. 12, §11H, I. In the absence oi holding by the Court that respondent suerior applies to claim against governmental entities under G.L.c. 12, §11I, the Town is entitled to a directed verdict in the absence of evidence that action of the town such as a town meeting vote, constituted coercion or intimidation or that an official town policy or custom interfered with Freeman's civil rights by coercion or intimidation. *Id.* If the Court concludes that respondent superior applies to Section 11I claim, then the town is entitled to the same qualified immunity that applies to immunizes public officers for their discretionary actions. See *Duarte v Healy*, 405 Mass. 43 tl989); *Rodriguez v Furtado*, 410 Mass 878 (1991) (Qualified immunity for officials making discretionary decisions).

5. The action against the West Boylston Planning Board and its members in their official capacity is essentially an action

action against the Town and the Court must direct a verdict in favor of the West Boylston Planning Board for the reasons set forth above.

By his attorney,

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Appendix C

Supplemental Motion for Directed Verdict
Filed September 18, 1992

COMMONWEALTH OF MASSACHUSETTS
Worcester, ss

Superior Court
Department of the Trial
Court of the Commonwealth
Civil Action
No. 88-3632

ELIOT R. FREEMAN,

Plaintiff

vs.

TOWN OF WEST BOYLSTON, PLANNING BOARD OF THE TOWN OF WEST BOYLSTON, KATHLEEN FOREMAN, GEORGE [SIC] GREENOUGH, WILLIAM FORREST AND LINWOOD PERRY, Individually and as they are MEMBERS OF THE PLANNING BOARD OF THE TOWN OF WEST BOYLSTON AND VICTOR CUSANELLO AS HE IS A MEMBER OF THE PLANNING BOARD

Defendants

SUPPLEMENTAL MOTION FOR DIRECTED VERDICT OF DEFENDANTS GREENOUGH, FOREMAN, PERRY AND FORREST

The individual defendants move for directed verdict as to both counts on the grounds that as a matter of law their conduct

was not an intentional violation of the plaintiff's civil rights and therefore these defendants are immune from liability under the State Civil Rights Act, See *Breault v Chairman of Bd of Fire Com'r,* 401 Mass 26 (1987) (Wilkins J., concurring) and also immune under the Civil Rights Act for the same reasons.

By their attorney,

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Dated: 9/18/92